

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY 21 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0015-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
DAVID ALBERTO CHAVEZ-PALMA,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093304001

Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Law Offices of Matthew H. Green  
By Matthew H. Green

Tucson  
Attorney for Petitioner

K E L L Y, Judge.

¶1 Petitioner David Chavez-Palma seeks review of the trial court’s order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Chavez-Palma has not sustained his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Chavez-Palma was convicted of solicitation to unlawfully possess a narcotic drug and unlawful possession of drug paraphernalia.<sup>1</sup> The trial court suspended imposition of sentence and placed him on probation for eighteen months. Chavez-Palma, who was “brought to the United States by [his] family when [he] was about four (4) years old,” subsequently was “charged . . . with being deportable because of [his] conviction” and was taken into custody by Immigration and Customs Enforcement.

¶3 In October 2011, Chavez-Palma initiated a post-conviction proceeding, arguing in his petition that his Sixth-Amendment right had been violated because his

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<sup>1</sup>The plea agreement Chavez-Palma signed included the following clause:

Immigration consequences of Admission. I understand that if I am not a citizen of the United States, pleading guilty or no contest to a crime may affect my immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. I understand that my plea or admission of guilt could result in my deportation or removal and further could prevent me from ever being able to get legal status in the United States, or could prevent me from becoming a United States citizen. My attorney has explained all this to me, I understand it, and I still want to enter this Plea Agreement.

counsel had not advised him of the immigration consequences of his guilty plea as required by *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S. Ct. 1473 (2010). He maintained that counsel had been ineffective in failing to advise him properly and that, although his claim was untimely, it could be raised pursuant to Rule 32.1(f) and (g) because his “failure to file a Rule 32 petition was due to no fault of his own, but to the fact that a new development in the law occurred.” And he further contended he had been denied due process because the trial court failed to properly advise him pursuant to Rule 17.2(f), Ariz. R. Crim. P. Noting that this court had decided that *Padilla* “does not apply retroactively,” see *State v. Poblete*, 227 Ariz. 537, 260 P.3d 1102 (App. 2011), the trial court summarily denied relief.

¶4 On review, Chavez-Palma asserts our decision in *Poblete* “was founded on a flawed analysis” and maintains the trial court erred in failing to address his separate argument that the court had not advised him pursuant to Rule 17.2(f) when it accepted his guilty plea. First, Chavez-Palma’s notice of post-conviction relief is untimely, and he therefore is entitled to relief only on certain grounds. Ariz. R. Crim. P. 32.4(a). In his petition for post-conviction relief, Chavez-Palma cited Rule 32.1 (f) and (g) as the grounds for relief. But, as we explained in *Poblete*, relief under Rule 32.1(f) is appropriate only “if the trial court failed to advise the defendant of his right to seek of-right post-conviction relief or if the defendant intended to seek post-conviction relief in an of-right proceeding and had believed mistakenly his counsel had filed a timely notice

or request.” 227 Ariz. 537, ¶ 6, 260 P.3d at 1104, *citing* Ariz. R. Crim. P. 32.1(f) 2007 cmt. Like *Poblete*, Chavez-Palma makes no such claim here.

¶5 As to Chavez-Palma’s claim under Rule 32.1(g), that *Padilla* constituted a significant change in the law that entitled him to relief, we agree with the trial court that he failed to state a colorable claim for relief. We have determined *Padilla* is not applicable retroactively, *Poblete*, 227 Ariz. 537, ¶ 16, 260 P.3d at 1107, and we decline Chavez-Palma’s invitation to reconsider that conclusion.<sup>2</sup>

¶6 Chavez-Palma’s Rule 17.2(f) argument likewise lacks merit. Chavez-Palma has cited no authority to show that his claim based on Rule 17.2(f) falls under any of the exceptions to the rule of preclusion with respect to untimely post-conviction proceedings. In any event, a court’s failure to properly advise a defendant pursuant to Rule 17.2 does not automatically require reversal, *State v. Denney*, 130 Ariz. 128, 130, 634 P.2d 579, 581 (1981), and we do not consider only the “oral exchange between the court and the accused” in determining whether the record as a whole shows “the defendant made a knowing and voluntary waiver of his rights,” *State v. Rodriguez*, 25 Ariz. App. 111, 113, 541 P.2d 574, 576 (1975). In this case, as noted above and by the trial court in its Rule 32 ruling, Chavez-Palma’s plea agreement informed him of the possibility of immigration consequences resulting from his guilty plea. And, the court expressly asked him if he had

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<sup>2</sup>Our supreme court denied review of this court’s decision in *Poblete* on February 15, 2012.

read the plea agreement and discussed it with his lawyer before signing it.<sup>3</sup> Thus, the claim is not only precluded, but appears to lack merit. This is not a situation in which Chavez-Palma was unaware of a consequence of his plea or has shown he was prejudiced by the court’s failure to provide the Rule 17.2 advisement. *See Denney*, 130 Ariz. at 130, 634 P.2d at 581. Therefore, although we grant the petition for review, we deny relief.

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

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<sup>3</sup>When at the change-of-plea hearing the court asked Chavez-Palma where he had been born, Chavez-Palma stated under oath that he had been born in Tucson. As a practical matter, this likely explains why the court failed to give the advisement required by Rule 17.2(f), but we do not approve its failure to follow the rule. That rule requires the court to advise the defendant without regard to his or her citizenship status, and indeed states that a defendant “shall not be required to disclose his or her legal status in the United States to the court.” Ariz. R. Crim. P. 17.2(f).